Supreme Court, U.S.
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No. 99-324

IN THE

Supreme Court of the United States

VALERIE COLE,

Petitioner,

v.

VINCENT TULLY, M.D. and
WAYNE MEMORIAL HOSPITAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
PENNSYLVANIA SUPERIOR COURT

BRIEF IN OPPOSITION FOR RESPONDENT WAYNE MEMORIAL HOSPITAL

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether this Court should deny certiorari of Petitioner's constitutional challenge to two former Pennsylvania statutes of limitations, when the statutes in question applied equally to all persons and protected individuals due process rights?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Wayne Memorial Hospital, is a nonprofit hospital corporation. Its parent is Wayne Memorial Health Systems, Inc. and no publicly held company owns any shares of its stock.

TABLE OF CONTENTS

	Page
Counter Statement of Question Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Counter Statement of Factual History	1
Reasons for Denying the Writ	2
I. Petitioner's Challenges To The Constitutionality Of The Two Pennsylvania Statutes Of Limitation, Now Repealed, Are Without Merit	4
II. Pennsylvania Decisions Are Not In Conflict With Other States On Important Federal Question.	10
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 10

Clark v. Jeter, 486 U.S. 456 (1988) 8

Dandridge v. Williams, 397 U.S. 471 (1970) 8

Desantis v. Yaw, 290 Pa. Super. 535, 434 A.2d 1273 (1981) 8

Fernandez v. United States, 673 F.2d 269 (9th Cir. 1982) 6

Gasparro v. Horner, 245 So.2d 901 (Fla. Dist. Ct. App. 1971), *cert. dismissed*, 249 So. 2d 689 (1971) 6, 7

Hohn v. Slate, 48 N.C. App. 624, 269 S.E.2d 307 (North Carolina Court of Appeals 1980) 7

Licano v. Krausnick, 603 P.2d 1066 (Colo. App. 1983) 7

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 4

Petri v. Smith, 307 Pa. Super 261, 453 A.2d 342 (1982) 8

Cited Authorities

	Page
Pittman v. United States, 341 F.2d 739 (9th Cir. 1965)	5
Reese v. Rankin Fite Memorial Hospital, 403 So. 2d 159 (Ala. S. Ct. 1981)	7
Rohrabaugh v. Wagoner, 274 Ind. 661, 413 N.E.2d 891	6
Sax v. Votteler, 648 S.W.2d 661 (Texas 1983)	10, 11
Stein v. The Washington House, 302 Pa. Super. 124, 448 A.2d 558 (1982)	8
United States v. Kubrick, 444 U.S. 111 (1979)	9
Von Colln v. Pennsylvania Railroad Company, 367 Pa. 232, 80 A.2d 83 (1951)	8
Walker v. Mummert, 394 Pa. 146, 146 A.2d 289 (1958)	8
Wheeler v. Lenski, 8 Kan. App. 2d 408, 658 P.2d 1056 (Kansas Court of Appeals 1983)	7
Wilson v. Garcia, 471 U.S. 261 (1985)	9
Zavala By and Through Ruiz v. United States, 876 F.2d 780 (9th Cir. 1989)	6

Cited Authorities

Page

Statutes:

12 P.S. § 34 ..... 2, 3

28 U.S.C. § 2401(b) 5

42 U.S.C. § 1983 9

42 Pa. C.S.A. § 5533 3

United States Constitution:

5th Amendment 3

14th Amendment 3

Rules:

Supreme Court Rule 10 2

Supreme Court Rule 10(b) 11

Other Authorities:

Texas Constitution, Article I, Section 13 11

Medical Malpractice Statutes of Limitation Minority Provisions, 62 A.L.R. 4th 758 7

Statute of Limitations Under Federal Tort Claims Act (28 USCS §2401(b)), 29 A.L.R. Fed. 482, § 10(a) 6

COUNTER STATEMENT OF FACTUAL HISTORY

Petitioner asserts in her Petition that, "as a result of manifest malpractice by Respondents, Valerie Cole sustained permanent and disabling injuries." (Pg. 8, Cole Petition). The Petitioner also describes, in detail, the injuries allegedly suffered as a result thereof. It must be remembered, however, that these allegations set forth in Petitioner's Factual History, are only allegations, and not proven or stipulated facts.

The only facts which are extant are those contained in a Stipulation of Facts entered into by counsel for all parties. As correctly noted by Petitioner, this Stipulation of Facts was entered into to aid the trial court in deciding Respondents' motions for summary judgment based upon the running of the applicable statute of limitations.

Among the facts agreed to by the parties as a result of the Stipulation of Facts were:

1. Petitioner was born on February 17, 1977.

2. Kathleen Rish-Cole and Phillip Cole (now deceased) were the parents and legal guardians of Petitioner throughout her life, during her minority, and until Petitioner attained the age of majority, i.e., eighteen years of age, on February 17, 1995.

3. During her minority, Petitioner resided with her parents and was in their custody, and maintained a familial relationship with her parents.

4. On March 20, 1977, Petitioner was seen by Respondent Vincent J. Tully, M.D. in the emergency room of Wayne Memorial Hospital, and admitted that date to the hospital.

5. Petitioner was treated for her condition, which was, upon admission, persistent diarrhea and vomiting, and released on March 28, 1977.

6. By May 1977, Petitioner's parents were aware that the Petitioner, then a minor, had been injured and that her injuries may have been caused by the conduct of the Respondents.

7. On March 20, 1977, as well as May 1977, the applicable statute of limitations was two years, pursuant to 12 P.S. § 34 (now repealed), a statute enacted in 1895.

8. Neither the parents of Petitioner, nor anyone acting on her behalf, filed suit against the Respondents for the injuries alleged, during the two years from May 1977 to May 1979, nor during her minority through February 17, 1995.

9. Petitioner, then an adult, instituted an action against the Respondents on February 5, 1997, some nineteen years and nine months after her parents were aware that her injuries may have been caused by the Respondents.

REASONS FOR DENYING THE WRIT

The issues in this case are quite simple, and their resolution below in favor of the Respondents by both the trial court, and the Pennsylvania Superior Court, and as affirmed by denial of an allowance of appeal by the Pennsylvania Supreme Court, does not merit review by this Court. As this Court is well aware, Supreme Court Rule 10 provides that review on a writ of certiorari is a matter of

judicial discretion, not a matter of right, and that such a petition will be granted only for "compelling reasons." For the reasons set forth below, Petitioner's case does not meet this standard, and the Petition should be denied.

Petitioner alleges medical malpractice against the Respondents, the Hospital and her physician, nearly twenty years after the injury occurred. The trial court properly granted Motions for Summary Judgment filed by the Respondents, on the basis that the applicable two-year statute of limitations then in effect barred Petitioner's claim. In 1977, the applicable statute of limitations provided no tolling for minority or insanity. If any individual failed to bring his claim within two years from the date of the alleged injury, he was forever barred.

Petitioner argues that the two-year statute of limitations for minors which was in effect in 1977, and contained in 12 P.S. § 34, is unconstitutional, as was the tolling prohibition contained in 42 Pa. C.S.A. § 5533, which replaced 12 P.S. § 34 in 1978. It is asserted that these statutes violate the 5th and 14th Amendments of the United States Constitution regarding equal protection and due process.

Petitioner contends that this Court must grant the writ to forge new legal ground and prevent an injustice to her. Petitioner makes these arguments, however, in the face of perhaps the most time-honored principle in the American judicial tradition — *stare decisis*. Well-established and long-standing legal precedent in Pennsylvania has already determined that the subject statutes involved in this case are constitutional and will apply to bar an otherwise proper claim where a party has failed to institute suit within two years of the date of the alleged injury. Additionally, Petitioner fails

to recognize the injustice and inequity which would occur to the Respondent Hospital if the statutes were found unconstitutional. Specifically, the Hospital would be forced to defend an action which occurred in excess of nineteen years prior, and after reliance on the statute of limitations which was enacted by the Pennsylvania legislature in 1895 and was in effect at the time of the alleged injury.

I.

PETITIONER'S CHALLENGES TO THE CONSTITUTIONALITY OF THE TWO PENNSYLVANIA STATUTES OF LIMITATION, NOW REPEALED, ARE WITHOUT MERIT

The deprivation complained of by Petitioner does not mandate due process review by this Court. In fact, this Court has held that not every civil litigant is entitled to a hearing on the merits in every case, and that "the State may erect reasonable procedural requirements for triggering the right to an adjudication, be they *statutes of limitations* . . . or, in an appropriate case, filing fees." (Emphasis supplied). *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 437 (1982). In *Logan*, a decision authored by Justice Blackmun, this Court also held that,

> . . . the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule.

455 U.S. at 437.

Assuming that the right to sue to recover for personal injuries is a protected interest for purposes of the Due Process Clause, the next inquiry must be what process was due the Petitioner. Petitioner contends that because she was a minor and therefore not capable of ascertaining her right to bring suit, she was totally deprived of her right to sue for her alleged injuries. This contention is without merit.

To begin with, Petitioner was not deprived of the right to maintain an action for her personal injuries. That right vested in her parents for a period of two years from the date upon which they became aware that she had been injured and that the injuries may have been caused by the Respondents, i.e., May of 1977. Thus, Petitioner's parents were required to file a claim on her behalf. This they admittedly failed to do. Should this Court second guess the Petitioner's parents in that regard?

The overwhelming majority view, state and federal, is that a statute of limitations is not tolled during minority, unless a statute provides for such tolling. In cases involving the two-year statute of limitations applicable in Federal Tort Claim Act (FTCA) cases, 28 U.S.C. § 2401(b), the federal courts have consistently refused to toll the statutory period during minority. For example, in a FTCA case decided by the Ninth Circuit involving the filing of a claim on behalf of an infant beyond the two-year statute, the court observed,

> It is well established that minority does not toll the limitations period prescribed in the Federal Tort Claims Act . . . implicit in the *Pittman* [*v. United States*, 341 F.2d 739 (9th Cir. 1965)] decision is that the parents or guardians of a minor

> must preserve the minor's claim by timely action. (citations omitted) (*Brown v. United States*, 9 Cir. 1965, 353 F.2d 578, 579).

Fernandez v. United States, 673 F.2d 269, 271 (9th Cir. 1982).

In arriving at the decision that the two-year statute of limitations would not be tolled by the parents failure to file suit on behalf of their injured child within the two-year period, the Ninth Circuit in *Zavala By and Through Ruiz v. United States*, 876 F.2d 780 (9th Cir. 1989), rejected the same due process argument Petitioner is making in this case stating,

> [The minor] did not suffer a due process violation. He had the opportunity, through [his father or his guardian] to file a claim within the two-year period.

876 F.2d at 784. See also cases cited in Annotation: *Statute of Limitations Under Federal Tort Claims Act (28 USCS §2401(b))*, 29 A.L.R. Fed. 482, § 10(a), pp. 528-530.

Similarly, a majority of state appellate decisions follow the general rule that infancy does not toll a statute of limitations, and have recognized that they are constitutional. In *Rohrabaugh v. Wagoner*, 274 Ind. 661, 413 N.E.2d 891 (Supreme Court, Indiana 1980), the Indiana Supreme Court held that the legislature is not constitutionally mandated to suspend application of statutes of limitation in the case of infancy or incompetency. The court found that the statute did not violate any of the plaintiff's constitutional rights. Additionally, the Florida case of *Gasparro v. Horner*, 245 So.2d 901 (Fla. Dist. Ct. App. 1971) (per curiam), *cert.*

dismissed, 249 So. 2d 689 (1971), held that the cause of action of a minor who was injured in an accident and lost her parents in that same accident, and which occurred more than four years prior to the commencement of her action, was barred by the four-year statute of limitations. The minor plaintiff was not adopted until 21 months after the accident, during that 21-month period the minor had no guardian, etc. to protect her interests, but the court still would not toll the statute of limitations. In the instant matter, Petitioner stipulated that she had a family with whom she maintained a relationship who could have brought the action on her behalf, but chose not to do so. *See also Reese v. Rankin Fite Memorial Hospital*, 403 So. 2d 159 (Ala. S. Ct. 1981) (holding that the statute of limitations as applied to minors did not violate equal protection provision of the State and Federal Constitutions); *Licano v. Krausnick*, 603 P.2d 1066 (Colo. App. 1983) (holding that the strict limits of three years in which to bring a medical malpractice action does not violate the equal protection clause since the statute guarantees like treatment to all who are similarly situated); *Wheeler v. Lenski*, 8 Kan. App. 2d 408, 658 P.2d 1056 (Kansas Court of Appeals 1983) (holding that a statute which shortens the period of limitations for minors, incapacitated persons and persons imprisoned did not violate a minor's right to equal protection and due process); *Hohn v. Slate*, 48 N.C. App. 624, 269 S.E.2d 307 (North Carolina Court of Appeals 1980) (noting that persons with malpractice claims are not a suspect class and a classification shorting the length of time within which to institute suit does not affect a fundamental right. Additionally, see Annotation, *Medical Malpractice Statutes of Limitation Minority Provisions*, 62 A.L.R. 4th 758.

Pennsylvania appellate courts have not only rejected Petitioner's constitutional claims in the instant case, but have rejected similar challenges in the past. *See Stein v. The Washington House*, 302 Pa. Super. 124, 448 A.2d 558 (1982); *Walker v. Mummert*, 394 Pa. 146, 146 A.2d 289 (1958); *Von Colln v. Pennsylvania Railroad Company*, 367 Pa. 232, 80 A.2d 83 (1951); *Petri v. Smith*, 307 Pa. Super 261, 453 A.2d 342 (1982); *Desantis v. Yaw*, 290 Pa. Super. 535, 434 A.2d 1273 (1981).

Petitioner also argues that the two Pennsylvania statutes of limitation at issue are unconstitutional as violative of the Equal Protection Clause. This contention is likewise, without merit.

As held by this in *Clark v. Jeter*, 486 U.S. 456 (1988), a case relied upon by Petitioner, different levels of scrutiny are applied to different types of classifications. 486 U.S. at 461. "At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose." 486 U.S. at 461.

The statutes at issue do not provide for the unequal distribution of benefits or the imposition of burdens. The statutes applied equally to all persons, and cannot be overturned on equal protection grounds. Thus, unlike the analysis performed by this Court in *Clark v. Jeter*, which involved an intermediate scrutiny review because the statute under consideration dealt with illegitimacy, the proper level of review for the statutes under consideration is the rational basis review. There being no "suspect" class involved, the review is limited to determining whether the two two-year statutes of limitations are rationally related to a legitimate state purpose. *Dandridge v. Williams*, 397 U.S. 471 (1970).

There can be no question that statutes of limitation are rationally related to a legitimate state purpose, as eloquently stated by this Court in *United States v. Kubrick*, 444 U.S. 111 (1979),

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L. Ed. 807 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 349, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1944).

Id. at 117.

Similarly, in a case involving a § 1983 action originally brought in the United States District Court of New Mexico, this Court noted,

> A federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." *Adams v. Woods*, 2 Cranch 336, 342, 2 L. Ed. 2d 297 (1805). Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have failed or evidence lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.

Wilson v. Garcia, 471 U.S. 261, 271 (1985).

Statutes of limitation are procedural rules established by our legislative bodies. Their importance in our system of jurisprudence cannot be overstated. As this Court has held,

> On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system.

Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980).

For the reasons set forth above, Petitioner has failed to show compelling reasons for the Court to review the constitutionality of the statutes at issue, and her petition should be denied.

II.

PENNSYLVANIA DECISIONS ARE NOT IN CONFLICT WITH OTHER STATES ON IMPORTANT FEDERAL QUESTION.

Petitioner asserts that the decision of the Pennsylvania Superior Court in this case is in conflict with the decisions of other states on an important federal question. On the contrary, the decisions cited by the Petitioner are patently distinguishable from the decision of the Pennsylvania Superior Court in this case, as well as the well-settled law of Pennsylvania upon which that decision was based. In that regard, Petitioner's reliance upon *Sax v. Votteler*, 648 S.W.2d 661 (Texas 1983) is misplaced.

To begin with, the decision of the Texas Supreme Court in *Sax v. Votteler* was not based on an important federal question. That decision rested entirely upon the interpretation by that Court of the Texas Constitution's "Open Courts Provision." Additionally, and as equally important, the statute of limitation in *Sax v. Votteler* involved a statute of limitation specially enacted under a state medical malpractice insurance act. In effect at the same time of the plaintiff's injury, was a general statute of limitation for personal injuries which provided for tolling during minority. This was not the situation with regard to the case at bar in 1977 when Petitioner was allegedly injured.

Likewise, the other cases cited by the Petitioner concerned statutes enacted pursuant to state medical malpractice or insurance acts. In the case at bar, the statutes of limitations in question were general statutes applicable to personal injuries, and not enacted specifically for medical malpractice.

The Texas Supreme Court in *Sax v. Votteler*, in fact, declined to decide the issue before it on the basis of the United States Constitution. 684 S.W.2d at 664. This decision relied upon by the Petitioner, was based upon in the Texas Constitution, Article I, Section 13. As stated previously, the other cases cited by Petitioner do not involve "important federal questions" in conflict with the well-established law of Pennsylvania.

The Petition for Writ of Certiorari based upon Supreme Court Rule 10(b) should be denied for the reasons set forth above.

CONCLUSION

For the reasons above presented, the Petition for Writ of Certiorari of Valerie Cole should be denied.

Respectfully submitted,

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